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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-810

DANIEL A. DELP, JR.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM A DECISION OF THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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BRIEF IN OPPOSITION TO A
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BRIEF FOR RESPONDENT

SUMMARY OF RESPONDENT'S ARGUMENT

I.A.

The Petitioner claims that a fatal variance appeared between the wording of his indictment and the proof. The Respondent submits that such variance, if it so existed, did not prejudice nor interfere with Petitioner's due process guarantees.

I.B.

The Petitioner further claims that the penalties imposed upon him were discriminatory because of an arbitrary "misclassification" by the Ohio legislature of hallucinogens, narcotics and dangerous drugs in violation of his "equal protection" guarantees. The Respondent submits that the nature of the crimes legislated against are different and an equal protection problem does not exist.

I.C.

The Petitioner claims that the statutory classification of marijuana and cocaine are erroneous and unconstitutional and that he, the Petitioner, was denied due process when the trial court failed to take judicial notice of his arguments in support of his arguments of "misclassification". The Respondent submits that the trial court was under no duty to take judicial notice of such scientific facts and properly exercised its sound discretion in refusing to do so.

I.D.

The Petitioner claims that the statutory misclassification of Ohio's drug laws leads to "unfettered" prosecutorial discretion in charging an accused. The Respondent submits that Ohio's laws providing for the regulation of narcotic drugs, hallucinogens, and dangerous drugs are founded upon a rational basis and provides regulation in specific areas.

II.

The Petitioner claims that Ohio's punishments for violations of narcotics laws constitute cruel and unusual punishment. The Respondent submits that whether a punishment is cruel and unusual within the meaning of the Eighth Amendment is not a question that can be considered in an abstract sense by merely taking into account the length of the punishment. The nature of the crime punish is also important.

III.

The Petitioner claims that the affidavit for search warrant was defective because the informant was unreliable. The Petitioner submits that at the time of the application for such warrant, the informant was available, and gave corroborating testimony to the issuing magistrate in support of the hearsay information contained in the officer's affidavit.

RESPONDENT'S REASONS FOR DENYING THE WRIT

I. A.

A VARIANCE BETWEEN THE PLEADINGS AND THE PROOF IN A CRIMINAL INDICTMENT IS NOT MATERIAL WHERE THE ALLEGATIONS AND PROOF SUBSTANTIALLY CORRESPOND, OR WHERE THE VARIANCE IS NOT OF A CHARACTER WHICH COULD HAVE MISLED THE ACCUSED AT TRIAL, AND IS NOT A DENIAL OF DUE PROCESS OF LAW.

The Petitioner was charged in the first count of the Indictment with possession for sale of an hallucinogen, not in accordance with Sections 3719.40 to 3719.49, inclusive, of the Ohio Revised Code. The language of the first count also named the hallucinogenic substances which the Petitioner was alleged to have possessed for sale as being, to-wit: "LSD, P.C.P. and Marijuana".

Ohio Revised Code Section 3719.40 specifically defines those substances which are to be considered "hallucinogens". The Section states in its first paragraph:

> "As used in Sections 3719.41 to 3719.49, inclusive, of the Revised Code,

> "hallucinogen" means lysergic acid diethylamide, commonly known as LSD., N-N-dimethyltryptamine, commonly known as DMT., cannabis, commonly known as marijuana, hashish, ganja, or bhang, psilocybin, mescaline, peyote, bufotenin, epena, parica, ayahuasca, yage, caapi, amanita, muscaria, and any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body."

During the Petitioner's trial, it was incumbent upon the Respondent to prove that the substance referred to as "P.C.P." since not specifically named as an hallucinogen within the definition section, fell within the category of "any other compound, mixture, preparation, or substance which produces hallucinations or illusions when introduced into the body."

The Ohio Seventh District Court of Appeals, upon review, found that there was no evidence submitted at trial to show that the substance known as "P.C.P." was an hallucinogenic substance, and there was no prejudicial error since it was shown that the Petitioner was, beyond a reasonable doubt, involved in the sale of marijuana, and that upon the date of his arrest was in possession of the same for that purpose.

In its Decision (See, Petitioner's Brief, "Appendix B", at p. 15 b) the Seventh District Court of

Appeals for Columbiana County, Ohio, found:

> ". . . from a review of the testimony of the chief prosecuting witness, that the appellant (Petitioner), beyond a reasonable doubt, was involved in the 'sale' of marijuana and upon the date of his arrest was in possession for that purpose."

It is a settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense. Clyatt v. U.S., 197 U.S. 207, 49 L Ed 726, 25 S Ct. 429 (1905).

The question of variance is one of law for the Court and unless it appears that it is prejudicial to the rights of the accused it will not be deemed material. Kemp v. U.S., 41 App DC 539, cert den 234 U.S. 756, 58 L Ed 1579, 34 S St. 675 (1914).

The Respondent submits that the variance between the pleadings and proof as to the characteristics of the subject matter involved in the first count of Petitioner's Indictment, being "LSD, P.C.P. and Marijuana" was not a fatal one.

It is a general rule that a variance between the pleadings and the proof is not material where the allegations and proof substantially correspond, or where the variance is not of a character which could have misled the Defendant at the trial, provided that it is not such as to deprive the accused of his right to be protected against another prosecution of the same offense. Berger v. U.S., 295 U.S. 78, 79 L Ed 1314, 55 S Ct. 629 (1935).

The Respondent submits that Petitioner's application has failed to show that in the setting of his particular case, the lower Court committed important and significant constitutional error, which, consistent with the federal Constitution, was so harmful that it must now result in the automatic reversal of his conviction.

The Respondent submits that the evidence of Petitioner's possession for sale of Marijuana and LSD was sufficient to support the verdict of conviction for the sale of an hallucinogen. Where the grounds for reversal are based upon the insufficiency of evidence to support a verdict, evidence must be viewed in a light most favorable to the government, and in light of all reasonable inferences that a Jury may draw therefrom. U.S. v. Millpax, Inc., 313 F 2d 152 (1963).

I.B.

WHERE A STATE STATUTE PROSCRIBES THE SAME PENALTY FOR DIFFERENT OFFENSES, AN ACCUSED CONVICTED AND SENTENCED FOR TWO DIFFERENT OFFENSES IS NOT DENIED EQUAL PROTECTION OF THE LAWS.

The Petitioner claims that he has been subjected to discriminatory penalties due to the unconstitutional classification of marijuana and cocaine as dangerous drugs. He further contends that Ohio Revised Code Section 3719.99 (D) has subjected him to the mandatory penalties for all drugs classified in the narcotics and hallucinogen category. He therefore concludes that this arbitrary classification has subjected him to a discriminatory penalty in violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

The Respondent submits that the concept of "equal protection under the laws" applies to differences in penalties among those who have committed the same offense. No equal protection problem is here presented. Those Ohio Revised Code Sections cited by the Petitioner which he uses to substantiate his claim of discriminatory penalties, relate in their application, to different offenses.

The Respondent submits that the power of a State to regulate narcotic traffic is within the scope of its police powers. Generally, such regulations have been held not to constitute a denial of constitutional guarantees of equal protection of the laws or of due process. Minnesota, ex rel. Whipple v. Martinson, 256 U.S. 41, 65 L Ed 819, 41 S Ct. 425 (1921).

The Respondent therefore submits that in determining whether or not a State law violates constitutional guarantees of equal protection, the Court must first consider the facts behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. Williams v. Rhodes, 393 U.S. 23, 30, 21 L Ed 2d 24, 31, 89 S Ct. 5 (1968).

The Respondent concludes that the Petitioner herein has not been disadvantaged by any unreasonable classification of the Ohio Drug Laws merely because the same penalty may be applicable to different offenses.

I.C.

THE STATUTORY CLASSIFICATION OF MARIJUANA AS AN HALLUCINOGEN AND THE CLASSIFICATION OF COCAINE AS A NARCOTIC DRUG BY THE OHIO LEGISLATURE IS NOT ERRONEOUS, NOT UNCONSTITUTIONAL AND DOES NOT VIOLATE AN ACCUSED'S RIGHT OF EQUAL PROTECTION UNDER THE LAWS.

WHETHER A TRIAL COURT TAKES JUDICIAL NOTICE OF MATTERS OF SCIENTIFIC UNCERTAINTY OR MATTERS WHICH ARE IN DISPUTE RESTS SOLELY WITHIN ITS SECOND DISCRETION.

The Petitioner contends that the classification of marijuana as an hallucinogen and the classification of cocaine as a narcotic drug are unconstitutional because factual, scientific and medical information with respect to such drugs fails to support these classifications as set forth in their respective sections of the Ohio Revised Code. Because the classifications are erroneous, the Petitioner contends that the penalties violate his rights of equal protection under the laws.

The Petitioner further claims that the trial Court denied him an opportunity to present evidence in support of his claim of such an unreasonable classification and further failed to take judicial notice on such scientific evidence.

The Respondent submits that there presently exists a great public debate as to the harmful or unharmful effects of the use of marijuana. However, the Respondent further submits that in taking judicial notice, a Court will only accept those facts which are generally known within the limits of its jurisdiction. In other words, facts of

universal notoriety need not be proved. Brown v. Piper, 91 U.S. 37, 23 L Ed 200 (1875.)

With respect to all matters of fact, the Court may, in a proper case, take judicial notice, but it is not generally bound to do so. See, 29 AM Jur 2d, Evidence, § 18 (1967). The discretion of the Court to take judicial notice of matters of common or universal knowledge should further be exercised with caution. Brown v. Piper, supra.

With respect to scientific facts, judicial notice will not be taken on such matters of uncertainity or matters which are in dispute. Schollenberger v. Pennsylvania, 171 U.S. 1, 43 L Ed 49, 18 S Ct. 757 (1898); Phillips v. Detroit, 111 U.S. 604 28 L Ed 532, 4 S Ct. 580 (1884). Such scientific matters will not be judicially noticed even though learnedly discussed in scientific publications. Ex parte Bain, 121 U.S. 1, 30 L Ed 849, 7 S Ct. 781 (1887).

Judicial notice has been taken, for example, that heroin even when found in a compound, is always a derivative of opium. U.S. v. Pisano, (C.A. 7 Ill.) 193 F 2d 355 (1953.) Courts have further declined to take judicial notice that tobacco in the form of cigarettes, is more noxious than in any other form. Austin v. Tennessee, 179 U.S. 343, 45 L Ed 224, 21 S Ct. 132 (1990).

The Respondent therefore, submits that the failure of the Trial Court, in the case at bar, to take judicial notice of scientific facts pertaining to the classification of marijuana and cocaine relative to their "statutory misclassification" was well within

its sound discretation.

The State further submits that the Petitioner was provided an opportunity for a factual hearing regarding the classification of drugs, and that the record in the case shows that Petitioner's request for said evidentiary hearing was granted. However, the Petitioner had no evidence other than excerpts from articles and treatises, of which he asked the Court to take judicial notice.

I.D.
THE DISCRETION OF A PROSECUTOR TO CHOOSE AMONG VARIOUS STATUTES DEALING WITH NARCOTICS RELATED CRIMES IS NOT "UNFETTERED" WHERE THE LEGISLATURE HAS PROVIDED HIM A RATIONAL BASIS FOR DISTINGUISHING BETWEEN CLASSIFIED OFFENSES.

Petitioner claims that his equal protection rights were violated because the Prosecutor had unfettered discretion to choose among different statutes for his prosecution, including Ohio Revised Code Sections 3719.32, 3719.42, 3719.43, 4729.28 and 4729.51 (C).

The Respondent submits that prosecutorial discretion, in and of itself, is not unconstitutional. (See, 16 (A)) C.J.S. Constitutional Law, Section 563, FN. 16.10). Only when that discretion is unfettered, when it is the Prosecutor and not the legislature enacting the laws, is the Constitution offended. The issue herein is whether the above mentioned statutes each prosecute the same acts.

Ohio Revised Code Section 3719.32 applies to the regulation and sale of poisons.

Ohio Revised Code Section 3719.42 applies to the licensing for the manufacture of hallucinogens.

Ohio Revised Code Section 3719.43 pertains to the licensing of a wholesaler other than a licensed pharmacist, owner of a pharmacy or a manufacturer licensed under Section 3719.42 for the possession or sale of any hallucinogen.

Ohio Revised Code Section 4729.28 applies to the unlawful sale of drugs by a person who is not a registered pharmacist or a pharmacy intern under the supervision of a registered pharmacist.

Finally, that Ohio Revised Code Section 4729.51 (C) specifically enumerates those persons who may sell, purchase, distribute or deliver "dangerous drugs". Respondent submits that Chapter 4729 of the Ohio Revised Code, is the chapter of the Ohio Code dealing with pharmacists.

The Respondent submits that the Ohio legislature has provided a rational basis for distinguishing between the aforementioned code sections.

protection violation is present in Petitioner's argument relating to discriminatory penalties.

The Respondent submits that Petitioner's argument misconstrues the meaning of the equal protection clause. The equal protection clause applies only where there is an arbitrary discrimination between classes similarly situated. In the case at bar, the Petitioner is attempting to have the Court compare dissimilar offenses.

II.

OHIO'S PUNISHMENTS FOR THE VIOLATION OF ITS NARCOTICS LAWS ARE NOT UNCONSTITUTIONALLY EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Petitioner claims that the State of Ohio continues to subject its citizens to morally and particularly excessive sentences for the possession of sale of small amounts of drugs. Petitioner concludes that these are "cruely excessive punishments" that have "violated the Eighth Amendment's prohibition against cruel and unusual punishment".

The Petitioner intimates that the penalties involved are cruely excessive in relation to the seriousness of the offense committed. He further submits that contemporary attitudes of American society towards drugs and the fact that no other State requires such excessive penalties for the violation of drug related offenses, indicates that the penalties therefore are unconstitutionally excessive and must be struck down. The Respondent respectfully submits that Petitioner would have this Court believe that the evolving

standards of society include a tolerance of drugs and hallucinogens.

The Respondent submits that what are cruel and unusual punishments are no longer to be tested as what was considered as cruel and unusual punishment at common law. Furman v. Georgia, 408 U.S. 238, 92 S Ct. 2726 (1972).

It is generally accepted that punishments which are prohibited by the Eighth Amendment include torture or other barbarous punishments, or degrading punishments unknown at common law, and punishments that are so disproportionate as to shock the moral sense of the community. McDougle v. Maxwell, 1 O St. 2d 68 (1964). See also, Kasper v. Brittain, 245 F 2d 92 (1957), and State v. Juliano, 24 O St. 2d 117 (1970).

The Respondent submits that the application of the current standard of cruel and unusual punishment should not affect the outcome of the Petitioner's case. The Federal government and State of Ohio, and various other states have considered hallucinogens, such as Marijuana and LSD, and narcotic drugs, to be dangerous substances in need of control.

Moreover, various Courts have found that harsh punishments for the control of hallucinogens and narcotic drugs do not shock the moral sense of the community and are not violative of the Constitution's Eighth Amendment guarantees. See, State v. Chaffin, 30 O St. 2d 13 (1972), in which the Ohio Supreme Court held that a 20 to 40 year prison

term for the sale of an hallucinogen did not constitute cruel and unusual punishment. See also, Rener v. Beto, 447 F 2d 20, (5th Cir., 1971), sentence of 30 years for the first offense of possessing marijuana; Anthony v. U.S., 331 F 2d 687 (9th Cir., 1964), total sentence of 40 years for two sales of marijuana; U.S. v. Cudato, 284 F 2d 464 (7th Cir., 1960), cert. den., 365 U.S. 881, rehearing denied, 366 U.S. 947, total sentences of 40 years for narcotics offenses; Black v. U.S., 269 F 2d 38 (9th Cir., 1959), cert. den., U.S. 938, total sentence of 30 years for narcotics offenses. See, generally, 33 A.L.R. 3rd 359 "cruel punishment-length of sentence", and cases cited therein.

III.

WHERE, IN A PROCEEDING FOR AN APPLICATION FOR A SEARCH WARRANT, ORAL TESTIMONY IS GIVEN TO AN ISSUING MAGISTRATE BY A NAMED, INFORMANT IN ADDITION TO SAID INFORMANT'S HEARSAY INFORMATION CONTAINED IN A POLICE OFFICER'S AFFIDAVIT, THE MAGISTRATE IS AFFORDED A SUFFICIENT OPPORTUNITY TO DETERMINE THE CREDIBILITY OF SAID INFORMANT AND THE SUFFICIENCY OF THE INFORMANT'S TESTIMONY.

The Petitioner argues that the Affidavit for the search warrant was defective because it failed to state the underlying circumstances necessary to enable the issuing magistrate to evaluate the informant's conclusions and further failed to establish said informant's reliability. As such, the Petitioner claims that the Affidavit for the search warrant failed to meet the two pronged tests of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. U.S., 393 U.S. 410 (1969).

The Respondent submits that the Affidavit for the search warrant met the first prong of the

Aguilar test on its face. Said Affidavit shows that an identified informant, one Dawn Gregory, had personal knowledge that drugs were present in Petitioner's home.

The Respondent submits that there was probable cause to believe that the residence had been recently used as a location from which to purchase drugs and that such drugs were probably still available. See, State v. Lee, 251 N E 2d 711 (1969). The Affidavit submitted to the Judge prior to the issuance of the search warrant was signed by a Salem, Ohio, police officer. Furthermore the issuing magistrate was afforded an opportunity to obtain oral testimony from the said informant, Dawn Gregory. Miss Gregory was able to give the issuing magistrate direct knowledge of the information which formed the basis for the magistrate's determination that probable cause existed to issue a search warrant. The Aguilar and Spinelli cases, on the other hand, dealt with a situation where the affiant had relied on an "unnamed" reliable informant who was never present to give additional testimony to that information given in the affidavit.

Given the additional corroborating testimony of the informant, at the time of the presentment of the affidavit, the Respondent submits that the issuing magistrate:

1. had the means to demonstrate the reliability hearsay declarant as set forth in the officer's affidavit, and;

2. had the means to ascertain that the hearsay declarant named in the affidavit had personally observed facts from which probable cause could be deduced.

The Respondent submits that the issuing magistrate had the means to test the reliability of the source of the hearsay declarant. As such, the Respondent respectfully submits that the search warrant was validly obtained on a corroborated affidavit showing probable cause to search the Petitioner's residence.

CONCLUSION

WHEREFORE, the Respondent submits that a Writ of Certiorari should not be granted in this case as Petitioner has shown no special and important reasons therefore.

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